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Supreme Court, U.S.
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In The
Supreme Court of the United States

BENEFICIAL NATIONAL BANK, ET AL.,

Petitioners,

v.

MARIE ANDERSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF ARIZONA, ALASKA, CONNECTICUT, GEORGIA, HAWAII, ILLINOIS, IOWA, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Nelson, Caleb, *Preemption*, 86 Va. L. Rev. 225 (2000) 8

Posner, Richard, *The Federal Courts: Crisis and Reform*, 190 (1985) 5

INTEREST OF THE *AMICI*

The question presented is whether the doctrine of complete preemption applies to state-law usury claims filed in state court against a national bank. The *amici* States have two discrete interests in the resolution of that question.

First, the doctrine of complete preemption affects important federalism interests. Under the well-pleaded complaint rule, state courts have the initial opportunity to resolve whether a state-law claim is preempted by federal law. That rule is a core component of the division of responsibility between state and federal courts, and reflects Congress's recognition of the competence of state courts. *See* Arthur A. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1797 (1998) (noting "the obvious federalism implications of the complete-preemption doctrine and its inconsistency with the well-pleaded complaint rule"). The *amici* States have an abiding interest in ensuring that this division of responsibility is not unjustifiably revised to lessen the role of state courts.

Second, the *amici* States have a significant interest in the extent to which the National Bank Act (NBA) is found to preempt state law. Although this case involves only a discrete section of the NBA, it is important to the States that this Court not waver from its long-standing precedent that the States retain concurrent jurisdiction over national banks operating within their borders.

SUMMARY OF ARGUMENT

At issue in this case is when complete preemption occurs, such that a state-law claim is converted into a federal claim by operation of law and may, therefore, be removed to federal court. This Court presently has before it two competing theories. Petitioners and the United States contend that complete preemption occurs whenever a plaintiff asserts a state-law claim that falls within the scope of "an exclusive federal cause of action" created by Congress. Pet. Br. 21; U.S. Br. 10. The Eleventh Circuit adopted the position that complete preemption in addition requires "clear congressional intent to permit removal." Pet. App. 4a. *Amici* submit that neither of these competing theories adequately explains when the doctrine applies.

Petitioners and the United States are correct in recognizing that the ultimate question does not center on removal *per se*, but on whether the state-law claim must be deemed federal in nature by operation of law. Once that transformation takes place, the federal courts have original and removal jurisdiction over the claim. It therefore does not matter whether Congress expressed any specific intent regarding removal. But Petitioners and the United States wrongly conclude that Congress intended certain types of state-law claims to be converted into federal claims. Simply put, it is one thing for Congress to enact a preemptive federal rule and concomitant federal cause of action; it is a far different thing for Congress to enact a rule that converts plaintiffs' state-law claims into federal claims. Such a rule does not, as a matter of logic, precedent, or policy, ineluctably follow from the former enactments.

Congress has long accepted the well-pleaded complaint rule and its ramifications, the most notable of which is the maintenance in state court of state-law claims subject to the defense of preemption. When Congress desires a different procedure, it can expressly provide for one, as it did in the Price-Anderson Act. *See* 42 U.S.C. §§ 2014(h)(h), 2210(n)(2) (deeming all actions asserting liability arising from nuclear incidents to be federal actions). Congress can also implicitly provide for the conversion of state-law claims into federal claims, as this Court found it did in Section 301 of the Labor Management Relations Act (LMRA), *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), and in Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). But absent congressional intent specific to the conversion of state-law claims into federal claims – as distinct from the intent to create an exclusive federal cause of action – there is no basis upon which to convert a plaintiff's claim by operation of law from a state-based claim into a federal claim. In *Taylor*, this Court found complete preemption only after applying precisely this approach.

When this standard is applied to the usury provisions of the National Bank Act, the result is affirmance of the Eleventh Circuit. Section 30 of the National Bank Act neither explicitly nor implicitly provides that state-law claims should be deemed federal by operation of law. It necessarily follows that the NBA does not convert state-law usury claims into federal claims. The United States' contention that the NBA mandates freedom from state laws is both irrelevant and incorrect: this Court has long and consistently held that national banks are subject to

numerous state laws. The proper outcome of this case, therefore, is for the Alabama state court to determine whether the NBA preempts application of the state usury law against Petitioners.

ARGUMENT

THE DOCTRINE OF COMPLETE PREEMPTION DOES NOT APPLY TO A STATE-LAW CLAIM WHICH A NATIONAL BANK ASSERTS IS PREEMPTED BY THE USURY PROVISIONS OF THE NATIONAL BANK ACT.

A. State-Law Claims Are Generally Not Removable to Federal Court Merely Because the Defense of Preemption Is Asserted.

Congress has never authorized federal courts to hear claims under their "arising under" jurisdiction to the full extent permitted by the Constitution. In *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824), the Court held that "arising under" jurisdiction within the meaning of Article III, Section 2, exists when the resolution of a federal question might determine the outcome of the case. In a series of cases culminating in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), however, the Court construed 28 U.S.C. § 1331 as giving federal courts far narrower "arising under" jurisdiction. In *Mottley*, the Court ruled that a federal court lacks subject-matter jurisdiction under § 1331 if the plaintiff's complaint asserts on its face only state-law causes of action, regardless of whether the defendant asserts (or can be expected to assert) federal defenses such as preemption. 211 U.S. at 152.

Concomitantly, this Court has held that an action "may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Cases may be removed under 28 U.S.C. § 1441(a) only if district courts "have original jurisdiction" over the action; and the well-pleaded complaint rule governs whether such original jurisdiction exists. Ever since Congress amended the removal statute in 1887, original and removal jurisdiction have been understood as co-extensive. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10-11 & n.9 (1983).

Several policies are furthered by Congress's embrace of the well-pleaded complaint rule through its enactment of, and amendments to, §§ 1331 and 1441, and its acceptance of the Court's construction of those provisions. Writing for the Court in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936), Justice Cardozo emphasized the practical advantages of the rule. "If we follow the ascent far enough," he wrote, "countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself." *Id.* at 118. The well-pleaded complaint rule is necessary, therefore, "[t]o set bounds to the pursuit. . . . We shall be lost in a maze if we put that compass by." *Id.* More concretely, plaintiffs may incorrectly anticipate defendants' defenses, the federal issue in a case may not become apparent until well after the litigation has proceeded in state court, and federal defenses may be "concocted purely to confer jurisdiction." Richard Posner, *The Federal Courts: Crisis and Reform* 190 (1985).

The well-pleaded complaint rule also serves the interests of federalism. The rule apportions cases between the state courts and federal courts in a manner that leaves state courts with considerable responsibility for construing federal law. That delegation of power to state courts reflects Congress's recognition that state courts are fully capable of discharging their constitutional mandate to construe federal law. *See* Miller, *supra,* at 1782 (the well-pleaded complaint rule "reflects ... the constitutional compulsion to properly distribute judicial jurisdiction between the state and federal courts"). It is also consistent with the state courts' historical role as arbiters of federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 & n.4 (1981).

B. The Well-Pleaded Complaint Rule Only Permits Removal of a State-Law Claim When Congress Specifically Intended That Type of Claim to be Transformed, by Operation of Law, into a Federal Claim.

In the ordinary case, when a plaintiff asserts a claim in state court that is preempted by federal law two things will transpire: the plaintiff will lose the case; and a state court, not a federal court, will issue that ruling. On rare occasion – when the doctrine of "complete preemption" applies – the case plays out very differently: the otherwise preempted state-law claim is converted by rule of law into a federal claim that is litigated in federal court. The issue before the Court is when this transformation of a state-law claim into a federal claim by operation of law should occur. The answer, we submit, is a simple one: when Congress specifically intends that outcome.

This congressional-intent rule differs in important ways from the positions advanced by Petitioners and the United States, on the one hand, and the Eleventh Circuit, on the other. Petitioners and the United States would make dispositive Congress's creation of an exclusive federal cause of action. Pet. Br. 21; U.S. Br. 10. Once Congress creates an exclusive federal cause of action, they argue, it follows that Congress also mandates the conversion of a state-law claim falling within the scope of that cause of action into a federal claim. But neither Petitioners nor the United States persuasively explains why that is so. As explained below, Congress is perfectly capable of expressing its specific intent to convert state-law claims into federal claims governed by an exclusive federal cause of action. When Congress elects not to express that intent, a strong presumption must exist that Congress did not intend to carve out an exception to the ordinary procedure applicable to preemption cases.

This congressional-intent rule differs in one fundamental respect from the rule adopted by the Eleventh Circuit. According to the court of appeals, the complete preemption doctrine applies only where there is "clear congressional intent to permit removal." Pet. App. 4a. The touchstone of the complete preemption doctrine, however, is not removal *per se*, but the conversion of a state-law claim into a federal claim. Once that conversion occurs, the claim could be brought in federal court either originally or through removal, just like any other federal claim. *See* 28 U.S.C. §§ 1331, 1441. The pivotal congressional

intent, therefore, is not an "intent to permit removal," but an intent to convert state-law claims into federal claims.[1]

1. Congressional intent to create an exclusive federal cause of action does not, by itself, establish congressional intent to convert a state-law claim into a federal claim by operation of law.

As a matter of pure logic, there is no necessary connection between creating an exclusive federal cause of action and converting otherwise preempted state claims into federal claims asserting that federal cause of action. Congress preempts state laws for a variety of reasons and through a variety of means. *See generally* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226-29 (2000) (discussing and contrasting "express preemption," "conflict preemption," and "field preemption"). As is obvious from the continued acceptance of the well-pleaded complaint doctrine, Congress's intent to preempt state law does not imply any intent to convert a preempted state-law claim into a federal claim.

[1] This characterization of the Eleventh Circuit's opinion is consistent with how Petitioners and the United States have characterized it. *See* Pet. Br. 29-32; U.S. Br. 26-27. We recognize, however, that this reading of the opinion may be a strawman. The court of appeals relied extensively (Pet. App. 5a-6a, 8a-9a, 15a) on its prior opinion in *Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, which focused not merely on congressional intent to permit removal, but on congressional intent to "'transform[ ] the state cause of action into a federal [one].'" 182 F.3d 851, 857 (11th Cir. 1999) (quoting Miller, *supra* at 1797-98). As argued in the above text, that latter focus is the correct one.

Congress also has a variety of reasons for creating federal causes of action that can be asserted in the place of preempted state-law claims. Most obviously, Congress often wishes to provide a private right of action for a particular injury, but wants the substantive law governing that action to be uniform across the country. In other instances, state law is "borrowed" and incorporated to furnish the governing federal rule, subject to specific federal remedies desired by Congress. *See, e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 1346(b) ("law of the place where the act or omission occurred" is controlling). Neither objective, however, can be achieved *only* if Congress additionally mandates that courts rewrite complaints filed in state court that assert state-law claims of the type covered by an exclusive federal cause of action. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("no legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). A run-of-the-mill dismissal of a preempted state-law claim does not in any way undermine the governing federal rules adopted by Congress.

To be sure, Congress might conclude that public policy would be served by declaring that state-law claims be converted into claims arising under exclusive federal causes of action. Congress did just that when it amended the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, through the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066. Through "its unusual preemption provision, *see* 42 U.S.C. § 2014(h)(h), the Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident.' § 2210(n)(2)." *El Paso Natural Gas Co. v.*

Neztsosie, 526 U.S. 473, 484 (1999). The statute thereby establishes original and removal jurisdiction over such causes of action in federal court – regardless of how those actions are initially pled by the plaintiff. *Cf. id.* at 484 n.6 (observing that the structure of the Price-Anderson Act "resembles" the complete preemption doctrine).

Express "conversion" provisions of this sort are "rare," *id.* at 485-86 n.7 – far rarer than the creation of exclusive federal causes of action. The obvious inference to be drawn is that Congress is aware of the option of transforming preempted state-law claims into federal claims, but chooses to exercise that option sparingly. It is common ground that the intent of Congress is the touchstone for determining whether the complete preemption doctrine applies. Under the Petitioners' and United States' position, however, that intent is "sometimes divined and sometimes fabricated." Miller, *supra*, at 1821. Far better, we submit, to rely on Congress specifically to instruct when it wants state-law claims converted into federal causes of action.

Moreover, this Court has described statutes that completely preempt state laws as "extraordinary." *Taylor*, 481 U.S. at 65, *quoted in Caterpiller*, 482 U.S. at 393. Yet, as the Eleventh Circuit observed in a prior decision, "[i]f the creation of a federal cause of action served as the sole litmus test for congressional intent, . . . complete preemption would be common rather than extraordinary." *Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 859 n.3 (11th Cir. 1999).

The Eighth Circuit, which applies the liberal standard suggested by Petitioners, has ruled that three federal statutes, in addition to the NBA, completely preempt state-law claims. *See Gore v. Trans World Airlines, Inc.*,

210 F.3d 944 (8th Cir. 2000) (the Railway Labor Act, 45 U.S.C. §§ 151-63; 181-88); *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151 (8th Cir. 1999) (the Warsaw Convention); *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996) (the Federal Railroad Safety Act, 49 U.S.C. § 20106 (previously 45 U.S.C. § 434)). The Fourth Circuit has held that Section 301(a) of the Copyright Act completely preempts state-law claims. *See Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232-33 (4th Cir. 1993). And the Eleventh Circuit suggested that, were it bound by Petitioners' standard, Section 612 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 532, would be completely preemptive. *Blab T.V.*, 182 F.3d at 858-59 & n.3. The list of exclusive federal causes of action presumably is longer still. If the well-pleaded complaint rule is to be side-stepped so frequently, it should be based on a specific congressional directive.

2. This Court's decisions confirm that the complete preemption doctrine applies only when Congress specifically intended to convert state-law claims into federal claims by operation of law.

The two instances in which this Court has found complete preemption confirm that a state-law claim is removable under the complete preemption doctrine only when Congress has specifically expressed its intent to convert that type of claim into a federal claim. Particularly instructive is *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), in which the Court held that Section 502(a) of ERISA completely preempted an employee's common law contract and tort claims asserting improper processing of a claim for benefits under an ERISA plan. The Court took

note of the federal cause of action created by § 502(a), which "lies at the heart of a statute with . . . unique pre-emptive force," but stated that without additional indicia of congressional intent it "would be reluctant to find that extraordinary pre-emptive power . . . that converts an ordinary state common law complaint into one stating a federal claim for purpose of the well-pleaded complaint rule." 481 U.S. at 65.

The Court found the necessary evidence that Congress specifically intended state-law claims falling within the scope of § 502(a) to be converted into federal claims. The Court first observed that "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA" (*id.*) – which the Court in *Avco* found mandates the conversion of state-law claims. The Court next pointed to explicit statements in the legislative history of ERISA speaking to this precise issue, quoting from the portion of the Conference Report describing ERISA's civil enforcement provisions: "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." *Taylor,* 481 U.S. at 65-66 (quoting H.R. Conf. Rep. No. 93-1280, p. 327 (1974)) (internal quotation marks and emphasis omitted).

The Court continued:

> No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits . . . federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA.

Id. at 66. The Court then summarized its understanding of the complete preemption doctrine, stating that "the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress." *Id.* at 66. The only fair reading of the Court's opinion is that the intent to which the Court referred was the intent to convert state-law claims into federal claims, not the mere intent to create an exclusive federal cause of action.[2]

The other statute the Court has found to completely preempt state-law claims is, as noted, Section 301 of the LMRA, 29 U.S.C. § 185. In *Avco*, the Court (without using the term "complete preemption") held that a state-law breach of contract claim alleging that a union breached a "no strike" clause in a collective bargaining agreement may be removed because it is "[a]n action arising under § 301" and "is controlled by federal substantive law even though it is brought in state court." 390 U.S. at 560. The *Avco* opinion did not explain the reasoning behind its conclusion, apparently because it believed the issue was largely resolved in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

Immediately prior to announcing its holding, *Avco* quoted the portion of *Lincoln Mills* which held that "the substantive law to apply in suits under § 301(a) is federal law" and that

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[2] Justice Brennan, in a concurring opinion to *Taylor*, wrote separately "only to note that today's holding is a narrow one," reaffirming that removal jurisdiction exists only when "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." *Id.* at 67-68 (Brennan, J., concurring) (alteration in original).

> state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. * * * *Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.*

Avco, 390 U.S. at 559-60 (quoting *Lincoln Mills*, 353 U.S. at 456-57) (emphasis added). *Avco* construed that final sentence as meaning "[a]ny state law applied" – even if asserted in the form of a state-law claim – "will be absorbed as federal law." This explains why the Court, directly after the above-quoted language, stated that Avco Corporation's state-law claim was federal in nature and, therefore, "ar[ose] under the 'laws of the United States' within the meaning of the removal statute." *Avco*, 390 U.S. at 560. No further explanation was needed.

Avco is therefore consistent with the proposition that the key intent in the complete preemption analysis is the intent to convert (or "absorb") state claims into federal claims. At the very least, it is a decision that did not seek to – and therefore does not – provide guidance regarding the contours of the doctrine that 15 years later, in *Franchise Tax Board, supra*, was given the name "complete preemption." 463 U.S. at 24.

In *Franchise Tax Board*, the Court stated that "[t]he necessary ground of [the *Avco*] decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law. . . ." *Id.* at 23 (footnote and internal quotation marks omitted). That explanation, however, begs the question: what made "the preemptive force of § 301 . . . so powerful"? *Id.* The Court

provided an answer four years later in *Taylor*, when it searched for congressional intent specific to the conversion of state-law claims into federal claims.

C. There Is No Basis Upon Which to Conclude That Congress, Through the National Bank Act, Intended to Convert State-Law Usury Claims into Federal Causes of Action.

Neither the text nor the legislative history of §§ 85 and 86 of the National Bank Act shows any specific intent to convert state-law usury claims into federal claims. In contrast to § 502(a) of ERISA, the language of the NBA's jurisdictional provision, 12 U.S.C. § 94, does not closely parallel the language of the LMRA's jurisdictional provision. And whereas the legislative history of ERISA demonstrates that Congress intended federal jurisdiction under ERISA to be co-extensive with that under the LMRA, the legislative history of the NBA is barren of any evidence suggesting an intent to convert state-law usury claims into federal claims.

At bottom, § 85 of the NBA borrows the laws of the home states of national banks as federal limits, and § 86 creates a federal cause of action that plaintiffs are free to invoke if they choose. For the reasons set forth in Section B, *supra*, that is insufficient to effectuate complete preemption. State-law usury claims are not converted by operation of law into federal claims arising under NBA, § 86. Respondents' case was properly remanded to state court, which is well able to determine whether state-law usury claims are preempted. Petitioners' and the United States' arguments to the contrary have no merit.

First, the United States emphasizes the important purposes behind the NBA, and in particular the intent "to create a . . . sound and stable system of banking institutions to support national economic development" (U.S. Br. 23), and one "that could not be disrupted by state legislation." U.S. Br. 24; *see also* Pet. Br. 12-13. In the first place, that history cannot take the place of the required congressional intent specific to the transformation of state-law claims into federal claims.

Furthermore, the United States and Petitioners elide this Court's long-standing recognition that national banks are subject to state laws and a dual system of enforcement. In 1870, this Court rejected a preemption challenge to a State's collection of a bank shares tax, declaring that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation . . . It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *First Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62 (1869).

In *McClellan v. Chipman*, 164 U.S. 347, 359 (1896), this Court rejected a bank's "assertion that national banks in virtue of the [NBA] are entirely removed, as to all their contracts, from any and every control by the state law," holding that state laws govern the business transactions of national banks except in areas where Congress expressly preempts state law or state law would impair the efficiency of the banks in carrying out their duties imposed by federal law. Numerous other decisions by this Court affirmed the rule that national banks remain subject to many state laws. *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 n.7 (1954) ("national banks may be

subject to some state laws in the normal course of business if there is no conflict with federal law"); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924) ("national banks are subject to the laws of a State in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States"); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation").

Most recently, in *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997), this Court reaffirmed the principle that "federally chartered banks are subject to state law" and, pointing to its earlier decisions, stated that it has "found numerous state laws applicable to federally chartered banks." The Court has upheld application to national banks of a state statute prohibiting branch banks, *First Nat'l Bank in St. Louis*, 263 U.S. at 656, state tort law, *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103 (1939), and a state statute administering abandoned deposit accounts, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247-52 (1944). Moreover, in *Atherton* the Court approvingly quoted the passage from *First National Bank v. Commonwealth* that national banks' "acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law." *Atherton*, 519 U.S. at 223 (quoting

First National Bank, 76 U.S. at 362). Any suggestion by Petitioners or the United States that national banks are uniquely immune from state law is simply incorrect.[3]

Second, Petitioners argue that applying a strict complete preemption standard is unfair to national banks because Congress enacted the National Bank Act prior to its enactment of the removal statute. Pet. Br. 30. But that merely reinforces our point. When Congress enacted the NBA in 1864, it gave both state and federal courts jurisdiction over suits against national banks. Yet suits filed against national banks in state court had to remain there because Congress had not yet authorized removal of such actions to federal court – and did not until it enacted the general removal statute in 1875. Congress therefore had no reason to mandate that state-law usury claims are transformed by operation of law into federal claims. Any suggestion that Congress in 1864 intended the transformation of state-law claims is utterly implausible.

Nor has Congress taken any action since that time to suggest an intent to transform state-law usury claims into

[3] The United States also invokes the doctrine of field preemption to support its position. U.S. Br. 19 & n.3. This fails for two interrelated reasons. First, as discussed above, the NBA has not been understood to occupy the field of regulation of national banks. Second, even if pure state-law usury claims against national banks are preempted by §§ 85 and 86 of the NBA, this would not mean that the NBA therefore preempts the "field" of state-law usury claims. Such a leap would make the concept of field preemption meaningless. When a federal law preempts a state law, one can always label the preempted subject matter a "field." But field preemption means something more, and does not fit here. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (field preemption may be inferred when the federal regulatory scheme is "pervasive").

federal claims arising under NBA, § 86. In 1868, Congress authorized the removal to federal court of actions filed against corporations organized under federal law – but expressly excluded national banks. Act of July 27, 1868, 15 Stat. 226-27, quoted in Pet. App. 12a. And Congress's enactment of the general removal statute in 1875 obviously evinced no particular intent regarding the transformation of state-law usury claims under the NBA. It is not the responsibility of this Court to rewrite the legislation in light of changed circumstances. Congress is fully capable of amending the NBA if it concludes that public policy would best be served by the transformation and removal of state-law usury claims filed in state court.

Finally, Petitioners and *amici* American Bankers Association, *et al.* argue that Petitioners' approach to complete preemption is justified by the need for federal court resolution of preemption issues involving national banks. Pet. Br. 32-33 n.22; ABA Br. 23-29. This lack of confidence in the ability of state court judges to decide federal preemption issues is inconsistent with bedrock principles of American jurisprudence and repeated statements by this Court. As Justice Powell wrote for the Court in *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976), "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to [federal] rights in the trial and appellate courts of the several States." Continuing, he added, "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse." *Id.* (citation and internal quotation marks omitted).

In the 139 years since Congress enacted the NBA, there has been no tradition of complete preemption of

state-law usury claims against national banks and no evidence of congressional intent to establish complete preemption. This Court should not accept the invitation of Petitioners and the United States to fabricate such an intent into the NBA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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